[APPELLATE CRIMINAL JURISDICTION]
WHITLEY, Ag. C.J.
January 11, 1938.

KAMARUDDIN BIN OMAR.....Appellant.
v.
PUBLIC PROSECUTOR.....Respondent.

[IPOH CRIMINAL APPEAL No. 71 of 1937]

Motor Vehicles Enactment (Cap. 168), Section (ii)—intoxication while in charge of motor vehicle—previous acquittal on charge of causing death by rash act—no evidence of intoxication adduced in former proceedings—res judicata inapplicable.

Where a person is charged with causing death by a rash act not amounting to culpable homicide, the fact that he was intoxicated at the time of the accident is irrelevant to the issue and ought not to be adduced in evidence. He may, however, be charged with being intoxicated while in charge of a motor vehicle and such evidence will become admissible.

MAGISTRATE'S CRIMINAL APPEAL.

Rodana Braddell for the appellant.

M. C. Hay, Deputy Legal Adviser, for the respondent.

WHITLEY, J.—This appeal from a conviction by the Taiping Magistrate came on for hearing before me at Ipoh on the 17th December, 1937. Being satisfied that the conviction was a proper one, I dismissed the appeal, but in view of the importance of some of the points raised, I intimated that I would give my reasons in writing later.

The appellant was charged with

(i) being intoxicated while in charge of a motor car an offence under section 45(ii) of the Motor Vehicles Enactment (Cap. 168).

(ii) failing to stop after an accident, an offence under section 45(iii) of that Enactment; and

(iii) failing to report an accident, an offence under sections 42(ii) and 45(iii) of the same Enactment.

He pleaded guilty to the second and third charges, and claimed trial on the first charge. He was convicted and sentenced to one month's rigorous imprisonment. This appeal is against that conviction.

The facts as established by the evidence for the prosecution were shortly as follows: At 11.55 on the night of the 4th July 1937 the appellant was driving his motor car along the Station Road, Taiping, in the direction of the station. The car, which according to a police witness was travelling fairly fast, ran into a rickshaw which was crossing the road, severely damaging it and killing the rickshaw puller. Without slowing down it went on and crashed into a stationary motor car on the grass on the right hand side of the road some 240 feet further on, and then went on in a zig-zagging manner at a speed which the driver of this other car estimated at 30 miles per hour. The appellant in his evidence stated that he only felt a slight bump and drove on to his house. He was arrested at his house, six miles from the scene of the accident, at 12.50 a.m. by Mr. Powell Evans, the Taiping Traffic Officer. The appellant smelt strongly of alcohol, and was examined by two doctors. I shall deal more fully with the evidence on this point later.

The appellant was tried on a charge of causing death by a rash act not amounting to culpable homicide, an offence under section 304A. of the Penal Code. He was convicted, but was acquitted on appeal, Pedlow J. expressing the opinion that the evidence established no more than a bad error of judgment, and intimating his view that the appellant should be charged with failing to stop after an accident and failing to report. During the whole of these proceedings there was no suggestion that the appellant was in any way under the influence of liquor, and no evidence was adduced on the point.

> The first ground of appeal argued before me was that "The learned Magistrate was wrong in considering the evidence concerning the actions of the appellant with regard to the accident except in so far as those facts had been found by the Judge in the previous proceedings since the matter of the accident with all the relevant circumstances relating thereto was completely *res judicata*."

Mr. Braddell (for the appellant) submitted that in view of the acquittal in the previous proceedings, the present prosecution was vexatious and improper, and amounted to persecution on the part of the State; that it was wrong to call again the evidence as to the accident and the events leading up to it, which had already been considered and adjudicated upon in the previous proceedings; and that if at the time of those proceedings Counsel for the State had believed himself to possess any reliable evidence that the appellant was under the influence of liquor, it was his obvious duty to have produced it then. Subsequently Mr. Braddell after the position had been explained to him by the Deputy Legal adviser very fairly withdrew any suggestion of impropriety on the part of the officers directing the prosecution; but as the question is one of considerable importance which is likely to arise again, I think it is desirable that I should say a few words on the point.

The position in the Federated Malay States as regard prosecution for this type of offences is similar to that in England. Here there may be a charge under section 304A of the Penal Code or one or more charges under the Motor Vehicles Enactment. In England there may be a charge

of manslaughter under the Common Law, or charges under the Road Traffic Act, 1930. The propriety or otherwise of joining a charge under this Act with a charge of manslaughter has been considered in two cases by the Court of Criminal Appeal. In *R.* v. *Stringer*, 24 Cr. Appeal Reports, page 30 (1933, 1 K.B. 704):

> The appellant was charged on an indictment containing two counts, the first of which alleged manslaughter and the second the driving of a motor vehicle in a manner dangerous to the public at the same time and place. The charge of manslaughter arose from the alleged negligence of the appellant in the driving of a motor lorry, and the charge of dangerous driving was based upon the same facts. The jury found the appellant not guilty of manslaughter, but guilty of dangerous driving.
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> It was held that the verdict was not bad in law as, upon the count which charged manslaughter, the appellant could not have been convicted of dangerous driving, and therefore if there had been two separate indictments tried at two separate times he could not, on the ground of his acquittal of manslaughter, have successfully put forward a plea of *autrefois acquit* to the charge of dangerous driving, because he would never have been in jeopardy on that charge. The proper procedure, however, when charges of manslaughter and dangerous driving are to be made against an accused person, is that the offences should be charged in separate indictments.

In *R.* v. *Carr*, 24 Cr. Appeal Reports, 199, it was held that a charge of driving a motor vehicle when under the influence of drink contrary to section 15 (i) (b) of the Road Traffic Act should not be tried together with a charge of manslaughter, even though Counsel for the defence consent to such a course being taken. On those authorities it is clear that the prosecution in the present case have acted with the utmost propriety. Even if there had been no such cases to be followed as precedents, it seems to me only fair and reasonable that unless a person is actually charged with being intoxicated the issue ought not to be confused by introducing the fact of his having taken drink. Similarly in the trial on the charge of being intoxicated when in charge of the car, the prosecution acted properly in making no mention of the fact that the rickshaw puller had been killed. That fact was only referred to by defending counsel for his own purposes.

In my opinion it was clearly proper for the prosecution to adduce again the evidence as to the manner of the appellant's driving at the time of and after the accident, in so far as it was relevant to the present charge, and tended to show whether he was intoxicated at the time; and I cannot see how the doctrine of *res judicata* can apply to shut out such evidence. In the previous proceedings the question of intoxication was not in issue and was never considered. All that the Court was called upon to decide then was whether the evidence was sufficient to establish a case of criminal rashness or negligence. The learned Judge found that the accident was caused by a bad error of judgment on the part of the appellant. To that extent but no further the matter must be regarded as being *res judicata*. The Judge was not asked to direct his mind to the further question whether that bad error of judgment was due to the appellant's judgment being impaired through his being under the influence of liquor. This question of liquor had quite properly been kept out of that trial entirely. Its introduction would only have served to obscure the real issue, and would certainly have tended to be prejudicial to the appellant. The prosecution were entirely within their rights, in view of the evidence which they had available, in subsequently bringing the present charge of being intoxicated while in charge of the car. I shall deal later with the definition of "intoxicated." For the moment it will suffice to say that one element to be considered in deciding whether or not a person is intoxicated is whether he was so under the influence of liquor as to impair his judgment. The appellant's driving and his behaviour before, at the time of, and after the accident, are clearly of the utmost relevance as bearing upon that point, and it would be unreasonable and absurd to exclude evidence as to such driving and behaviour merely because the same evidence has already been called and considered in its hearing upon a totally different issue, namely the question of criminal rashness or negligence.

The second ground of appeal argued was that the learned Magistrate did not specifically find that the appellant was intoxicated. This was not one of the grounds put forward in the formal grounds of appeal, but no objection was taken on that account. I could see no substance in this ground. The Magistrate commenced his short oral judgment with these words:—"Charge 1: Being intoxicated while in charge of a motor vehicle." After setting out his reasons he concluded with the words: "On this charge therefore I convict the accused." This can only mean "I convict on the charge of being intoxicated," and that must involve a finding that the appellant was intoxicated. It was objected that from the reasons which the Magistrate gave it would appear that he treated the charge as a charge of being so under the influence of alcohol as to affect the appellant to a dangerous extent in carrying out of the occupation in which he was engaged and not as a charge of being intoxicated. It is clear that that is the test which the Magis-

trate applied in considering whether the appellant was intoxicated. and in my opinion that was a proper test to apply. There is no definition of 'intoxicated' in the Enactment, and no cases were cited to show what definition has been given to the word by the Courts. That being so, the Court is entitled to look to the ordinary meaning of the word. Webster defines 'intoxicated' as "under the influence of an intoxicating liquor or drug," and 'drunk' as "being under the influence of an intoxicant especially alcoholic liquor so that the use of the faculties is materially impaired." It would accordingly be proper to direct a jury that in trying to decide whether a man was intoxicated while in charge of a motor car, they should ask themselves the question whether he was so under the influence of alcohol that the use of his faculties was so impaired. That is precisely how the learned Magistrate, who was performing the function of a jury as well as those of a Judge, directed himself. Having indicated the evidence which led him to answer that question in the affirmative, there was no necessity for him to go on to say "I therefore find that he was intoxicated." Such a finding follows as an inevitable corollary.

Mr. Braddell's final submission was that there was no evidence upon which the Magistrate could properly find that the appellant was intoxicated. In my opinion there was ample evidence to support this finding, and this ground of appeal also failed. Whether or not a person was intoxicated at any particular time is essentially a question of fact for a jury (see *R.* v. *Presdee,* 20 Cr. Appeal Reports, page 95) and a Magistrate sitting as a jury is entitled to view the evidence as a whole in forming his opinion. Here the cumulative effect of the evidence was overwhelming, and I do not see how the Magistrate could have arrived at any other conclusion. We start off with the finding of Pedlow J. that the accident was caused by a bad error of judgment on the part of the appellant. Following upon the accident we have the evidence of eccentric driving. The appellant did not stop to see what he had struck. He did not slow down. He went on for 240 feet, collided violently with the car parked on the grass on what was his (the appellant's) wrong side of the road, rebounded into the road, swerved again on to the grass, and after finally regaining the road drove six miles home with a flat tyre. When the traffic officer Mr. Powell Evans saw him at the house one hour after the accident, he smelt strongly of alcohol, appeared very unsteady and nearly fell into a drain. At 1-30 a.m. about 1½ hours after the accident he was examined at Taiping Hospital by the Assistant Medical Officer Dr. Lim Eng Cheang. At a distance of one foot he smelt strongly of alcohol, and the doctor formed the opinion that he was under the influence of alcohol. A little later Dr. Shelley examined him. He told Dr. Shelley that he had had some sort of accident; that he had felt a slight bump and thought that he must have hit something. That apparently was the only impression which the accident had made upon him, although from the state of the car it must have had a most violent impact. The windscreen was broken, the bumper and both right mudguards badly bent, half the right running board had been torn off, and the rim of a wheel was badly buckled. Dr. Shelley also noticed that his breath smelt strongly of stale alcohol, and that he did not speak naturally. He staggered slightly when walking along a straight line and stumbled on a chair. Dr. Shelley formed the opinion that two hours previously the appellant must have been in a dangerous condition, and that the effects of alcohol were on the wane.

Even if no direct evidence had been procurable as to the appellant having in fact taken drink that evening, it seems to me that whilst making every allowance for the effects of shock and other points in the appellant's favour the only reasonable conclusion to which one could come on the evidence which I have just outlined was that the accident and the appellant's actions were due to his being under the influence of alcohol.

It is not incumbent on the prosecution in such a case to prove what drink has been taken, but in this case evidence was available to show that the appellant had at a hotel and a rest house drunk two small beers and two half-brandy and ginger ales. This may not appear to be much, but the appellant admitted that he had taken this drink on an empty stomach. and as the Deputy Legal Adviser pointed out, there was a possibility that other drink had been taken in private as to which no evidence was available. But, as I have already indicated, the question for the Court in a case like this is not the quantity of drink which has been taken but the condition of the accused person as the result of whatever drink he had taken, the object of the section under which the charge was laid being to protect the public from the risk of injury at the hands of motor car drivers, who by reason of the effects of alcohol are not in a fit state to exercise due care in their driving.

It was objected that no witness actually stated in so many words that in his or her opinion the appellant was 'intoxicated.' But as was pointed out in the case of *R.* v. *Presdee,* to which I have already referred, the question as to whether a person was drunk or intoxicated is one for the Court, not the witnesses, to decide, and just as in cases where the defence of insanity has been set up it is generally not proper to ask a witness whether a person was in his opinion 'insane' similarly it seems to be preferable when it is a question of intoxication, to avoid as far as possible the use of that word and to ques-

tion the witnesses as to actions and symptoms which they have actually observed as was done in this case. From the answers to such questions the Magistrate or jury as the case may be can form their own opinion as to whether the accused person was in fact intoxicated. As is pointed out by Mr. Taylor in his Principles and Practice of Medical Jurisprudence, 8th edition, Volume 2, at pages 624 and 625, the term 'drunk' is incapable of receiving a general definition.

By it we mean that a person was so affected by the action of alcohol that his conduct was sufficiently abnormal to lead to his arrest in the particular circumstances charged. This definition obviously includes vastly different stages in the intoxication by alcohol, for a man driving a motor car in traffic might be considered drunk, where a person under the influence of alcohol to the same extent, but driving a horse-vehicle, might not be considered drunk, and further the state at which the horse driver might be considered drunk would by no means be held reprehensible in the case of a pedestrain.

> "The effect of the alcohol on the conduct of the individual is the important issue and the point at which the influence exerted by alcohol may cause danger to others varies with the particular occupation of the person at the time of arrest."

The learned author accordingly recommends that in giving evidence about the condition of such a person a medical practitioner should not use the word 'drunk' if it can be avoided, but should state whether the person had taken alcohol or not, and whether in his opinion the alcohol was taken in sufficient quantity to affect the patient to a dangerous extent in carrying out the occupation in which he was engaged when arrested. In my opinion that recommendation is a wise one.

There was no appeal against the sentence of one month's imprisonment, and I do not think it could be reasonably suggested that that sentence was excessive. I would go so far as to say that I should not have felt disposed to interfere if a heavier sentence had been imposed. The Courts in England are taking a very serious view of this type of offence and severe sentences are being regularly imposed. A person driving a motor vehicle when in such a state is a public menace, and upon a conviction drastic punishment is called for both as a warning to him and a deterrent to others.

Appeal dismissed.